

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 21 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0300-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DANIEL DIAZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700013

Honorable Charles A. Irwin, Judge

REVIEW GRANTED; RELIEF DENIED

The Law Office of Kelly A. Smith
By Kelly A. Smith

Yuma
Attorney for Petitioner

B R A M M E R, Presiding Judge.

¶1 Petitioner Daniel Diaz seeks review of the trial court’s denial of his motion to extend the time to file a petition for post-conviction relief, as well as its dismissal of his notice of post-conviction relief and the denial of his motion to reconsider those decisions. We review a trial court’s denial of post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Following a jury trial, Diaz was convicted of possession of a dangerous drug for sale and sentenced to an aggravated term of twenty-five years’ imprisonment. Contemporaneously with his notice of appeal, Diaz filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court stayed pending the outcome of his appeal, which ultimately affirmed his conviction but remanded the case for resentencing. *State v. Diaz*, 222 Ariz. 188, ¶ 15, 213 P.3d 337, 341 (App. 2009). The Supreme Court of Arizona then reversed this court’s decision and affirmed the sentence imposed by the trial court. *State v. Diaz*, 224 Ariz. 322, ¶ 18, 230 P.3d 705, 708 (2010). The trial court vacated the stay in this Rule 32 proceeding in June 2010.

¶3 Before and after the trial court stayed this proceeding, appointed counsel, Kelly Smith, sought numerous extensions of Rule 32’s deadlines. In April 2008, the court granted Smith an extension in which to file the petition for post-conviction relief because she needed “more time to review the transcripts and the substantial file in this matter.” After missing the extended deadline, Smith then filed a second request for an extension, asserting she had “mis-calendered” the due date for the petition; the court subsequently stayed the post-conviction proceeding pending the outcome on appeal.

¶4 In June 2010, after the supreme court had issued its mandate in this matter, Smith filed a motion to lift the stay and set a deadline of July 6, 2010, for filing the petition for post-conviction relief, and the trial court granted that request. In a motion dated July 16 and filed on July 19, Smith requested an additional extension until July 26 to file the petition. In that motion, the only ground Smith asserted to support yet another extension was that she “mistakenly [had] calendared [the deadline] for July 16, 2010 instead of July 6, 2010.”

¶5 In its ruling dismissing the post-conviction proceeding with prejudice, the trial court summarized the history of Smith’s extension requests and found “no extraordinary circumstances have been shown to justify further extensions in this matter.” The court also noted it had “reviewed the record of proceedings before the Court of Appeals . . . and note[d] the number of extensions to file Opening Brief filed by [Smith] and the Court’s Orders and Findings regarding the untimely filings including the imposition of sanctions for counsel’s non-compliance.” On August 19, 2010, Smith filed a motion for reconsideration stating she had been unable to file the petition timely because of medical and family issues of a “very personal nature,” which she asserted constituted “extraordinary circumstances.”¹ The court summarily denied the motion to reconsider.

¶6 Smith filed this petition for review on Diaz’s behalf on September 24, 2010, challenging the trial court’s denial of the motion to extend time to file a petition for

¹According to Smith’s motion, she mailed Diaz’s petition for post-conviction relief to the court on July 26, 2010; however, no such petition is part of the record now before us.

post-conviction relief and its dismissal with prejudice of the post-conviction proceeding. Pointing out that the untimely filing of the petition was due to no wrongdoing on Diaz's part, Smith urges us to grant relief "in the interests of justice and fairness" and suggests that, at the very least, the court should have conducted a hearing in this matter. Rule 32.4(c)(2), Ariz. R. Crim. P., requires a "showing of extraordinary circumstances," for successive extensions of time to file a petition for post-conviction relief. Absent an abuse of discretion, we will not interfere with the court's ruling.

¶7 Here, Smith repeatedly asked for extensions, offering only the vague and unsupported explanation that she needed more time to review the file or that she had "mis-calendared" the proper filing date. Although Smith asserts she provided "exceptional circumstances" in the motion to reconsider, we can infer by the court's summary denial of that motion that it either did not find those circumstances sufficiently extraordinary, or that it deemed her explanation to be "too little too late." Because Smith did not meet her burden of showing excusable noncompliance with Rule 32, the court did not abuse its discretion in summarily dismissing the notice of post-conviction relief.

¶8 In addition, to the extent Diaz asks us to grant relief on the claim of ineffective assistance of trial counsel purportedly set forth in the petition for review, a pleading that is not a part of the record before us and one which he concedes the trial court did not address, we decline to do so. This court will not address on review any issue on which the trial court has not first ruled. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see* Ariz. R. Crim. P. 32.9(c)(1)(ii) (aggrieved party may petition for review of issues decided by trial court).

¶9

Accordingly, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge